Honorable Marc Barreca
Chapter 7
Hearing Date: October 7, 2011
Hearing Time: 9:30 a.m.
Hearing Place: Courtroom 7106
Response Date: October 5, 2011

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re ADAM R. GROSSMAN, Debtor.	No. 10-19817-MLB RESPONSE TO DEBTOR'S MOTION FOR ORDER DECLARING PROPERTY NOT ABANDONED FROM THE BANKRUPTCY ESTATE

Jill Borodin ("Rabbi Borodin"), a creditor herein, by and through counsel, Shelly Crocker and Crocker Law Group PLLC, responds to Debtor's Motion For Order Declaring Property Not Abandoned From The Bankruptcy Estate as follows:

BACKGROUND

Debtor is the recent ex-spouse of Rabbi Borodin. Debtor has filed three Chapter 11 bankruptcy petitions which are relevant to Debtor's current motion.

First, Debtor filed a Chapter 11 petition on June 25, 2010 (hereinafter "Debtor's First Petition"). On Schedule A of Debtor's First Petition, Debtor lists '868 Montcrest Dr., 96003' (hereinafter "Montcrest") as community real property having an estimated

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value of $210,500. *See* **Exhibit A** to the Declaration of Shelly Crocker. Debtor's First Petition was dismissed on July 22, 2010, for failure to file schedules or statements. *See* **Exhibit B** to the Declaration of Shelly Crocker.

Second, Debtor filed a Chapter 11 petition on July 27, 2010 (hereinafter " Debtor's Second Petition"). Debtors' Second Petition was dismissed on August 10, 2010, for failure to meet minimum filing requirements; Debtor submitted no Schedules or Statement of Financial Affairs. *See* **Exhibit C** to the Declaration of Shelly Crocker.

Third, Debtor filed for Chapter 11 bankruptcy again on August 19, 2010, under the present case number (hereinafter "Debtor's Third Petition), Docket # 1. Schedules were filed for Debtor's Third Petition on September 2, 2010, Docket # 16. Debtor did not list Montcrest on Schedule A. On March 4, 2011, Debtor filed his 2nd Amended Schedule A, Docket #97. Montcrest was not listed on Debtor's 2nd Amended Schedule A either.

On March 11, 2011, upon Trustee's motion, Debtor's Chapter 11 proceeding was converted to a proceeding under Chapter 7, Docket # 118. After receiving an order to extend time to file post-conversion schedules and statements, Debtor finally filed his post-conversion schedules on May 26, 2011, Docket # 182. Again, Debtor did not list Montcrest on his 3rd Amended Schedule A. Notably, the only place that Montcrest *is* listed is under question 10(b) of Debtor's 2nd Amended Statement of Financial Affairs; property that has been transferred by Debtor within the last ten years.

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During the time that Debtor was filing this multitude of Chapter 11 petitions, Debtor and Rabbi Borodin were parties to a dissolution proceeding in the King County Superior Court (the "Divorce Court"), cause number 09-3-02955-9 SEA. Trial commenced on November 15, 2010. *See* **Exhibit D** to the Declaration of Shelly Crocker.

On November 5, 2010, Debtor filed a motion in the dissolution proceeding requesting that the Divorce Court exclude from decision any division of assets and liabilities, citing Section 362(b)(2)(A)(iv) of the Bankruptcy Code. *See* **Exhibit E** to the Declaration of Shelly Crocker. In response, Rabbi Borodin filed an *ex parte* motion for an order confirming that no stay was in effect pursuant to 11 U.S.C. 362(c)(4), Docket # 52. Rabbi Borodin's *ex parte* motion was granted on November 12, 2010, Docket # 61.

After having received assurance that it could proceed in the division of assets and liabilities by the Bankruptcy Court, the Divorce Court entered a Decree of Dissolution on December 14, 2011. In its Decree, the Divorce Court awarded certain property to Debtor and certain property to Rabbi Borodin. Montcrest was awarded to Rabbi Borodin.

Instead of transferring Montcrest to Rabbi Borodin as the Divorce Court ordered, Debtor transferred Montcrest to an unknown third party. *See* **Exhibit F** to the Declaration of Shelly Crocker. Debtor has never provided any tracing of funds received from the sale of Montcrest, although public records, including the Deed of Trust, show that the property realized at least $215,000. In light of Debtor's actions, the Divorce Court held him in violation of the Divorce Decree and ordered Debtor "to pay all proceeds from the sale of the Montcrest property ($215,000) to Rabbi Borodin by September 15, 2011, in

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lieu of the property itself" If Debtor failed to do so, he would be incarcerated. Instead of following the Divorce Court's order to pay the $215,000 resulting from the sale of Montcrest to his ex-wife, Rabbi Borodin, Debtor has brought this motion, claiming that Montcrest (property which he has already transferred in violation of a court order) should be considered property of the bankruptcy estate. Judicial estoppel, abstention, and principles of comity and equity dictate that Debtor cannot succeed in his efforts to further obfuscate and complicate the distribution of his assets. Debtor's motion should be denied for the reasons stated herein.

JUDICIAL ESTOPPEL PRECLUDES DEBTOR'S ARGUMENT

The Supreme Court reviewed the doctrine of judicial estoppel in New Hampshire v. Maine, 532 U.S. 742, 749-750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001):

> "…[C]ourts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982), by "prohibiting parties from deliberately changing positions according to the exigencies of the moment," United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993). See In re Cassidy, 892 F.2d 637, 641 (7th Cir. 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982) (judicial estoppel "protect [s] the essential integrity of the judicial process"); Scarano v. Central R. Co., 203 F.2d 510, 513 (3rd Cir. 1953) (judicial estoppel prevents parties from "playing 'fast and loose with the courts'" (quoting Stretch v. Watson, 6 N.J.Super. 456, 469, 69 A.2d 596, 603 (1949))). Because the rule is intended to prevent "improper use of judicial machinery," Konstantinidis v. Chen, 200 U.S. App. D.C. 69, 626 F.2d 933, 938 (C.A.D.C. 1980), judicial estoppel "is an equitable doctrine invoked by a court at its discretion," Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) (internal quotation marks and citation omitted).

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Protecting the integrity of judicial proceedings and the bankruptcy process were at the heart of the Ninth Circuit's ruling in Hamilton v. State Farm Fire & Casualty Co., 270 F.3d 778 (9th Cir. 2001). "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position." Id. at 785. The Hamilton court went on to state, "[t]his court invokes judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings, and to protect against a litigant playing fast and loose with the courts…" Id.

Here, judicial estoppel applies because Debtor is attempting to use the Bankruptcy Court as a vehicle to perpetuate his malevolence toward his ex-wife. The Divorce Court ordered Debtor to transfer Montcrest to Rabbi Borodin as part of the Decree of Dissolution. Debtor violated the Divorce Court's order and transferred Montcrest to a third party. The Divorce Court then found Debtor in contempt and threatened him with incarceration if he did not pay the funds from the sale of Montcrest to Rabbi Borodin by September 15, 2011. Again, Debtor failed to follow the Divorce Court's instruction. Instead, Debtor brought this motion on September 20, 2011 to avoid complying with the Divorce Court order or being incarcerated.

Debtor's position as to the nature and character of Montcrest is also inconsistent. As the Divorce Court stated in its Findings and Order on Contempt Review Hearing, "Mr. Grossman has repeatedly engaged in activities designed to obfuscate the character

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of the property before the court and complicate the ultimate distribution of assets. It is notable that even Mr. Grossman's attorney could not state who held title to the Montcrest property." *See* **Exhibit F** to the Declaration of Shelly Crocker at 5.

For example, Debtor does not list Moncrest on Schedule A of his Chapter 11 petition. The only place that Montcrest appears is under Section 10(b) of Debtor's Statement of Financial Affairs; property that has been transferred by the debtor within the past 10 years. It is also important to note that Debtor's Amended Statement of Financial Affairs was filed on May 26, 2011, and the Dissolution Decree ordering Debtor to transfer Montcrest to Rabbi Borodin was entered on December 14, 2010. It is clear that Debtor illegally transferred Montcrest *after* the Divorce Court's order unequivocally granted Rabbi Borodin ownership of Montcrest.

It is an insult to the dignity of this Court that Debtor is now attempting to argue that Montcrest should be treated as part of the bankruptcy estate. Debtor has taken inconsistent positions regarding the character and nature of Montcrest, and is attempting to pervert the judicial process to serve his own personal vendetta against his ex-wife. How can Debtor now argue that Montcrest is and has been a part of the bankruptcy estate when he has already transferred the property in violation of a court order? Granting Debtor's motion to essentially invalidate the Divorce Court judgment would be inconsistent with the policy of making bankruptcy a means of offering relief to financially pressed debtors and not as providing a shelter from the consequences of criminal acts. H.R. Rep. No. 595, 95th Cong., 1st Sess. 342 (1977), *reprinted in* App. Pt.

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4(d)(i) *infra*; S. Rep. No. 989, 95th Cong., 2d Sess. 51 (1978), *reprinted in* App. Pt. 4(e)(i)*infra*. For the reasons stated above, the doctrine of judicial estoppel applies and Debtor's motion should be denied.

ABSTENTION

Discretionary abstention is governed by 28 U.S.C. § 1334(c)(1), and applies to proceedings arising under title 11, arising in a case under title 11, or relating to a case under title 11: "Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." Krasnoff v. Marshack (In re General Carriers Corp.), 258 B.R. 181, 189-190 (9th Cir. BAP 2001) (quoting 28 U.S.C. § 1334(c)(1)).

Traditionally, the federal courts been wary to become embroiled in family law matters. Ingram v. Hayes, 866 F.2d 368, 369 (11th Cir. 1988). It is also not the intent of the Bankruptcy Code to "convert the bankruptcy courts into family or domestic relations courts – courts that would in turn, willy-nilly, modify divorce decrees of state courts…" Caswell v. Lang, 757 F.2d 608, 610-611 (4th Cir. 1985). Although Caswell involved domestic support obligations, that court's concern that "there is a danger that bankruptcy will be used as a weapon in an on-going battle between former spouses…" is certainly applicable in the present case. Id. at 610.

A federal court may abstain upon request of a party or *sua sponte*. Carver v. Carver, 954 F.2d 1573, 1579 (11th Cir. 1992). "The abstention provisions of the

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[Bankruptcy Code] demonstrate the intent of Congress that concerns of comity and judicial convenience should be met, not by rigid limitations on the jurisdiction of federal courts, but by the discretionary exercise of abstention when appropriate in a particular case." In re Wood, 825 F.2d 90, 93 (5th Cir. 1987).

In the present case, Debtor filed a motion in the dissolution proceeding requesting that the Divorce Court exclude from decision any division of assets and liabilities, citing Section 362(b)(2)(A)(iv) of the Bankruptcy Code. In response, and out of fear that Debtor would engage in further dilatory tactics such as the bringing of this motion, Rabbi Borodin filed an *ex parte* motion for an order confirming that no stay was in effect pursuant to 11 U.S.C. 362(c)(4). The motion was, "presented for the purpose of providing the Divorce Court with the necessary assurance to proceed with all aspects of the dissolution proceeding, including division of assets and liabilities…" Rabbi Borodin's *ex parte* motion was granted on November 12, 2010.

Only after receiving assurance that it could proceed in the division of assets and liabilities by the Bankruptcy Court did the Divorce Court enter a Decree of Dissolution. The Bankruptcy Court's assurance that the Divorce Court could proceed in the division of assets and liabilities, if not a direct statement of abstention, certainly qualifies as constructive abstention. The Bankruptcy Court was aware that the State Court was going to allocate Debtor's assets and liabilities when it signed Rabbi Borodin's *ex parte* motion and assured the Divorce Court that it could proceed.

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The Bankruptcy Court's decision to abstain and allow the Divorce Court to proceed with the division of marital assets and liabilities reflects the principles of judicial economy, comity, and the hesitancy of bankruptcy courts to intrude into areas of domestic relations. Debtor's *post hoc* assertion that the Divorce Court's decision is invalid is a futile attempt to avoid paying Debtor's ex-wife under the terms of the Decree of Dissolution.

PRAYER FOR RELIEF

1.) Deny Debtor's Motion For Order Declaring Property Not Abandoned From The Bankruptcy Estate in its entirety;

2.) Grant any other relief that may be just and equitable.

DATED this 5th day of October 2011.

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By *____/s/ Shelly Crocker__________*
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